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CHARLES ELMORE DROPL
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 1154

BASIL R. CRAMPTON,

Petitioner,

vs.

CRAMPTON MANUFACTURING CO.,

Respondent.

**RESPONDENT'S BRIEF OPPOSING PETITION
FOR WRIT OF CERTIORARI.**

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*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

There are no "special and important reasons" for a review on writ of certiorari,—certainly none of the character exemplified in Rule 38, paragraph 5 (a), (b) or (c), nor any reason concerned with the public interest in the controversy. Indeed, the public is benefited by having respondent's device freed from the monopoly of petitioner's patent. Thus the public gains by continued enjoyment of the fruits of respondent's promotion of progress in the art instead of having to await the expiration of petitioner's patent before being able to do so.

The burden of petitioner's song is that the Court of Appeals violated Civil Procedure Rule 52(a). Perhaps he

seeks to develop some such reason for review as the one expressed in 5(b) of Supreme Court Rule 38 where it reads "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of review". But surely there was no such departure by the Court of Appeals in the instant case when it held that the fact-finding No. 11 of the District Court, upon which petitioner stands, was clearly erroneous.

It follows that no such question arises as the one put at page 5 of the petition,—"may it [Appellate Court] flout and disregard the facts found?"

We understand that this Court is not ordinarily interested in purely factual issues, and there is nothing at all unusual or exceptional in that respect about the course that the case at bar has taken. Indeed, the underlying facts of the case are not in dispute. The only controversial fact-issue, if it can properly be called such, is whether the claim-language excludes the accused structure.

The situation is simply this: The finding in question was authored by petitioner's attorney to support his theory of response to the claims by the accused device. That theory was rejected by the Court of Appeals. As in most patent cases, the issue of infringement turned upon the *scope* of the claims, which, in the instant case, contain recitals held by the Court of Appeals not to be applicable to the accused device. The District Court had found that they were. The Court of Appeals held that such finding was clearly erroneous, and that the petitioner, as an improver, was only entitled to a narrow range of equivalents which did not embrace respondent's separately patented device.

Obviously such situation suggests no reason whatever for exercise by this Court of its powers of review.

If the situation was the reverse, then there might well be reason for review, having regard to the public's not being

foreclosed from profiting by promotion of the art at the hands of *respondent*. The inconsistency referred to in *Directoplate Corp. v. Donaldson Lithographic Co.*, 51 F. 2d 199, C.C.A. 6th (cited and quoted from in the opinion of the Court of Appeals), citing *Claude Neon Lights v. E. Machlett & Son*, 36 F. 2d 574, C.C.A. 2d, as "between application of the doctrine of equivalents and of the doctrine that the claim and that alone must measure the monopoly", might very likely have supplied a reason for review.

As it is, the instant opinion very properly applied the doctrine that "the claim and that alone must measure the monopoly". Surely this suggests no reason for review.

The inconsistent doctrine had its origin in *Winans v. Denmead*, 15 How. 343, "over a strong dissent", as stated in *Claude Neon Lights v. E. Machlett & Son, supra*, and it is interesting to note that the dissenting opinion (concurred in by three others of the Justices) concluded with the statement "the principles of legal interpretations *as well as the public interest*, require that this language of this statute shall have its full significance and import" (emphasis supplied),—referring to language of the then statute which ran similarly to that of the present statute as to how the applicant for a patent "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

It is interesting to note that this Court quite recently gave recognition to that dissenting opinion,—in *Cuno Engineering Co. v. Automatic Devices Corp.*, 314 U. S. 84, 92.

The crux of the matter in the instant case is that each of the claims that was upheld but found not to have been infringed, particularized as follows:

"* * * said base rotatably receiving and limiting the degree of rotation of said lever" (emphasis supplied).

As to this, the opinion of the Court of Appeals, reads (Tr. 189):

“Each of claims 11, 12 and 13 expressly states, among other things, that the base receives the lever.”

In the accused construction the base does not receive the lever, and so the opinion states, after further reference to recitals of the claims (Tr. 189):

“The chief difficulty with this is that the claims do not read literally upon the accused construction.”

The opinion goes on as to resemblance of the accused construction to prior art, and how it solved “a problem not met with either in Crampton [petitioner] or in the prior art”.

Later on the opinion refers to Crampton’s departure from teachings of that prior art, as follows (Tr. 190):

“He thus eliminates entirely the ‘spindle’ arrangement of the accused device which connects with the lever and actuates it from the inside of the tank.”

Such an arrangement was borrowed *by respondent* from the prior art to which the opinion had alluded as bearing resemblance to the accused device (Tr. 189-190). The circumstance that respondent’s inventors converted the prior art construction into one which would reach the same *result* as did petitioner’s, surely does not itself make for infringement of the latter’s claims,—particularly when each of them is specific to a different character and arrangement of handle, lever, and base from that of the prior art in question.

Added to this there is the significant fact that Crampton was not the first to devise a construction providing for permanent pre-assembly of handle, lever and base, to be mountable as a unit upon the tank. He was preceded by Theleen (patent No. 1,147,764 Tr. p. 148^b Tr.), whose type

of handle, lever and base arrangement, which was different from that of the prior art hereinbefore referred to, Crampton improved upon.

The situation simply is that Crampton and respondent's inventors Pleasant *et al.* were *independent improvers upon different types of prior art*, each entitled to claim his own specific construction,—with no more than a very narrow range of equivalents permissible. And so it follows that Crampton, as the prior improver, has no status entitling his claims to dominate respondent's separately patented device (Pleasant *et al.* patent No. 2,313,840, Tr. p. 160*).

The opinion recognizes that "Crampton is entitled to a limited range of equivalents", but goes on to state (Tr. 190) that

"it must be kept in mind that in his claims he has limited himself to the form, location and functions of his handle, base and lever."

A little later on the opinion reads (Tr. 190):

"In the specification he refers to it as a suitable handle which actuates the lever from the *exterior* of the tank, the mounting of which on the said actuating lever constitutes one feature of the present invention." (Emphasis supplied). See page 1 of the Crampton specification, line 14, second column, (Tr. p. 148).

This completely disposes of petitioner's contention that his claims read upon the accused construction, which does not have that feature at all, since it directly concerns the claim recital of lever being received by the base connoting that the lever extends to the *exterior* of the tank.

There is nothing whatever to be derived from the specification of the patent in suit which is in any way suggestive of any other relationship, and certainly no indication of a concept such as that of respondent's inventors which is

portrayed in the Pleasant *et al.* patent and embodied in the accused structure.

We deem it unnecessary to reply to the petition and supporting brief *in extenso*, and so we shall simply make running comments on a few of the unwarranted statements therein:

1. At page 10 petitioner refers to a contention of respondent as having been sustained by the Circuit Court of Appeals for the Sixth Circuit "upon two *different methods of assembly of the parts* in the patented structure". Respondent advanced no such contention. The patent in suit describes only *one* method of assembling. Petitioner may have intended to refer to differing methods of assembly as between that described in the patent in suit and that practiced by respondent and described in *its* patent (Tr. 160^o). But if petitioner means to say that the Court of Appeals found non-infringement upon that basis, and, as he says "not upon any lack of identity of the *completed structures*", he is in error. The opinion of the Court of Appeals does not particularly refer to the methods of assembling and, as shown by quotations hereinbefore made from the opinion, the conclusion of non-infringement *did* rest upon *contrast between the completed structures*, having particular regard to the call of the claims for a "base rotatively receiving * * * said lever".

2. At page 14 of the petition error is assigned on the score of the Court of Appeals having reached its decision "by a species of deceptive and subtle argumentation and reasoning", and over on page 20 this is carried to the point of charging "falsely literal reading of the clause 'said base rotatively receiving and limiting the extent of rotation of said lever'". These aspersions are wholly unwarranted. The claims were dealt with just as they read and respondent's structure was found not to respond. If

anything "deceptive" or "subtle", or "a play upon words", appears it is rather to be found in petitioner's attempted reading of the claims upon the accused structure and in certain phrasing of Finding 11 which apparently misled the District Court. We refer to the statement in that finding that respondent's construction "provides a rockable lift lever mounted upon and extending through said wall fixture or spud", whereas it is not the lever that so extends but the integral spindle of the operating handle.

Petitioner chooses to disregard the fact that the claims set up the "flush tank actuating lever" as one distinct element, and the operating handle as another. In his perverse endeavor to apply the claims to respondent's structure he would have the actuating lever and operating handle *together* constitute the actuating lever of the claims. It is thus that he undertakes to justify the above-quoted phrasing of Finding 11, though he must of necessity recognize that, in respondent's structure, it is the spindle of the handle which extends through the spud, not the actuating lever which is wholly outside the spud.

3. At page 13 error is assigned "In mis-describing the prior art and stating that respondent's flush tank lever was more similar to it than to Crampton". Not only does the opinion below correctly describe the prior art in question, but petitioner's brief (p. 18) describes it in the same way. As to resemblances, the assigned error is an over-statement of what the opinion says upon the subject. Thus petitioner assigns error "In stating * * * that respondent's flush tank lever was *more* similar to it [prior art] than to Crampton", (emphasis supplied) whereas the opinion reads (Tr. 189-190) :

"But appellant forcefully points out that the accused construction had *as much* resemblance to four patents of the prior art * * * as to Crampton." (Emphasis supplied.)

It is interesting to observe at this point that petitioner himself refers to these same four patents as showing "a handle with an integral 'spindle' which was to extend through the tank wall fixture or spud", wherein lies the resemblance to respondent's structure.

4. What was "admitted by the respondent's expert and major witness", as referred to in assigned error No. 7 at page 14, of the petition, was not at all an admission of equivalency between the *completed structure* of the patent in suit and respondent's *completed structure*. The witness testified that they were *not* mechanically equivalent to each other (Tr. 99-100). His admission, on cross-examination, as to equivalency, went merely to the matter of leverage *per se* when the lever and handle were integrated, and he pointed out on re-direct examination (Tr. 114) that the prior art Theleen patent (Tr. 148^b) shows the same sort of leverage as the patent in suit.

Incidentally the disparagement of Theleen at page 19 of the petition is an over-statement. That device was not "ineffective and inefficient". See Frost testimony (Tr. pp. 74 to 84) which tells of the marketing of the Theleen device over a period of years and the reasons for its discontinuance.

5. The asseverations of structural identity, colorable difference and the like, repeatedly found in the petition and supporting brief, run counter to the judgment of the Patent Office as represented by the grant of a patent upon respondent's structure (Tr. 160^e). Here it is interesting to note that the structure illustrated at the back of petitioner's brief on the right hand page (unnumbered) appears in a patent solicited by *petitioner* subsequent to the grant of the patent in suit#, notwithstanding which illuminating

#This subsequent patent No. 2,320,912 issued June 1, 1943, is not in the record of the case except as a copy of it was inserted in one of petitioner's briefs in the District Court. The illustration at the back of the petitioner's brief is a reproduction of Fig. 2 of the said patent.

circumstance, we find petitioner presenting this as another example of "substantial identity in structure" with what appears in the patent in suit!

This rather strikingly points up the aim of petitioner to blanket and throttle the art by founding so broad and far reaching a monopoly upon his first patent as to pre-empt the whole field so that the public must wait upon expiration of that patent before enjoying any benefit from subsequent inventions, except of course those of petitioner himself or those acquired by him.

CONCLUSION.

No "federal question" has been decided in a way "indisputably" in conflict with applicable decisions of this Court, or "probably" so. What petitioner maintains in this regard appears to pertain to the venerable doctrine of mechanical equivalency, but that is always an open question for determination by the facts and circumstances of each particular case. Certainly no "indisputable conflict" arises out of an adjudication of non-equivalency of structures in one case, and an adjudication of equivalency of different structures in another case. As so well put by Judge Learned Hand in *Claude Neon Lights v. E. Machlett & Son*, *supra*:

"Each case is inevitably a matter of degree, as so often happens, and other decisions have little or no value. The usual ritual, which is so often repeated and which has so little meaning, that the same result must follow by substantially the same means, does not help much in application; it is no more than a way of stating the problem."

The opinion of the Court of Appeals in the instant case very properly determined the infringement issue by holding petitioner to the particulars of his invention as recited

in his claims, and, insofar as the question of equivalents was concerned, conceded "a limited range", but quite as properly ruled respondent's separately patented invention to be beyond that range. In so doing no "federal question" was decided "in a way probably in conflict with applicable decisions of this court",—simply because petitioner is able to cite instances of this Court's having applied the doctrine, as for example, in *Sanitary Refrigerator Co. v. Winters et al.*, 280 U. S. 30. In that case the accused device was found to be "substantially identical" with that of the patent in suit,—"the slight change in the form of" the accused device being "merely a colorable departure", whereas in the instant case the Court of Appeals found substantial and material differences between the accused device and that of the patent in suit.

We submit that neither of the reasons advanced by petitioner for review by this Court is sound, and that the petition should therefore be denied.

Respectfully submitted,

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